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SUPREME COURT OF THE UNITED STATES

ROBERT BAKER,

Petitioner

v.

STATE OF MISSOURI

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MISSOURI

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## INDEX



## CITATIONS

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The petitioner, Robert Baker, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri affirming the conviction of petitioner and the sentence of death.

OPINION BELOW

The opinion of the Supreme Court of Missouri, reported at 636 S.W.2d 902, appears at Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered August 23, 1982. Petitioner's motion for rehearing filed in that court was denied September 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

OTHER PARTIES TO THE PROCEEDING
IN THE SUPREME COURT OF MISSOURI

The only respondent in the proceedings in the Supreme Court of Missouri was the State of Missouri. However petitioner was one of numerous appellants in a separate proceeding in that court entitled State of Missouri v. Lawrence Payne, wherein one of the issues was the validity of the indictment in petitioner's

case. That issue was briefed and argued in the Supreme Court of Missouri by counsel in the Payne case. At the request of counsel in petitioner's principal case, the two cases were consolidated in the Supreme Court of Missouri as regards the single issue pertaining to the indictment. In due course, the Supreme Court of Missouri ruled on that issue in this case. (Op. 8-13) It is believed that the other appellants in the Payne case have no interest in the outcome of the petition for writ of certiorari filed by petitioner herein.

## QUESTIONS PRESENTED

I

The only direct evidence of petitioner's guilt consisted of petitioner's confession. The confession tended to show both conventional murder and felony murder committed in the course of a robbery. The questions presented are: (1) whether the decisional inconsistency of the Missouri Supreme Court as to what constitutes a lesser included offense--resulting, in the case at bar, in a ruling that petitioner was not entitled to an instruction on felony murder--operated to deprive petitioner of constitutional due process of law; (2) whether the trial court was required, as a matter of constitutional due process of law, to give the jury an instruction on felony murder to provide an alternative to a conviction carrying the death penalty.

II

Whether the death sentence should be set aside on grounds of constitutional due process of law for the reason that the finding of the jury as regards the aggravating circumstance pertaining to the murder of a police officer is not inconsistent with a finding that the petitioner did not himself shoot the

victim or attempt to do so and did not intend that a killing take place.

III

Whether, under the circumstances of this case, the aggravating circumstance pertaining to the murder of a police officer requires, as a matter of constitutional due process of law, a determination that petitioner knew that the victim was a police officer; and whether the imposition of the death penalty herein constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

IV

Whether the death sentence should be set aside because there was insufficient evidence, as a matter of constitutional due process of law, to support the jury's finding as regards the aggravating circumstance; and if there was sufficient evidence, whether constitutional due process of law requires a finding by the jury that petitioner knew that the victim was a police officer.

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment VIII:

"Excessive bail shall not be required, or excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV, sec. 1:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law."

## STATUTES INVOLVED

RSMo 1969 sec. 559.010 provided:

"Murder in the first degree.--Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree."

The Missouri legislature repealed this statute effective September 28, 1975 and enacted sec. 559.005 et seq. (see RSMo 1975 supplement). Sec. 559.005 and sec. 559.007 provided as follows:

"559.005. Capital murder defined.--A person is guilty of capital murder if he unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of a human being."

"559.007. First degree murder defined.--The unlawful killing of a human being when committed without a premeditated intent to cause the death of a particular individual but when committed in the perpetration or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping is murder in the first degree."

The Missouri legislature repealed these sections effective May 26, 1977 and enacted in lieu thereof sec. 565.001 et seq. Pertinent sections are as follows:

"565.001. Capital murder defined.--Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder."

"565.003. First degree murder defined.--Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping."

"565.004. Murder in the second degree.--All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree."

"565.008. Death penalty, when imposed--life imprisonment, when imposed--minimum of fifty years to be served, when--first and second degree murder, penalties for.--1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections

565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years on his sentence.

2. Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives . . ."

"565.012. Evidence to be considered in assessing punishment in capital murder cases.--1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence . . .

2. Statutory aggravating circumstances shall be limited to the following: . . .

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty."

## STATEMENT

Petitioner was convicted of capital murder in the Circuit Court of the City of St. Louis and was sentenced to death. The Missouri Supreme Court affirmed.

### The State's Evidence

Gregory Erson was a police officer employed by the St. Louis Metropolitan Police Department. On June 19, 1980 he was temporarily assigned to work at the "Stroll", a high crime area in the City of St. Louis as an undercover agent on a prostitution detail. (T. 222) He drove an unmarked automobile and wore blue jeans and a softball shirt. (T. 263)

At about 11:30 PM he was parked on the south side of Westminster Avenue. There was a shooting. (T. 291) Police officer Michael Ciaccio arrived at the scene shortly thereafter. He saw Erson's dead body lying on the front seat of the automobile. Erson's wallet, which contained his police badge, was in his back pocket. A police miniature radio was on the front seat,

partially covered by Erson's body. (T. 275)

The next day petitioner learned that the police were looking for him, and he turned himself in. He was interrogated by two detectives assigned to the Homicide Division, and made a statement substantially as follows. (T. 443-57) (*) On the previous evening, Leslie Lomax and Lonnie Moyers came for him at his residence, and they rode in a pickup truck, Moyers doing the driving. They drove to Lomax' house, where Lomax obtained a pistol. Lomax asked petitioner if he would like to make some money and petitioner agreed. They rode around the Stroll looking for someone to rob. At about 11:30 PM they noticed an automobile parked on Westminster Ave. They parked the truck a short distance away. There was a man in the automobile and Lomax approached the automobile and talked to him. The man told Lomax that he was looking for a date. Lomax came back to the truck and told petitioner that the man probably had money. Thereupon Lomax and petitioner both went to the automobile to rob him. Petitioner went to the passenger side of the automobile and Lomax to the driver's side. Petitioner, holding Lomax' pistol at his side, demanded the man's money. When the man reached for a gun in a holster on his left leg, petitioner shot him. Petitioner took about $60 out of the man's pocket. He saw a pistol lying on the floor between the seat and the door on the driver's side, and he took that too. Petitioner and Lomax then went back to the truck and petitioner divided the money with Lomax and Moyers, and gave Lomax both pistols. Then they left the scene.

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(*) At the trial, petitioner asserted that this statement was involuntary because it was the result of beatings by the police. The trial court denied his motion to suppress the statement and this ruling was affirmed by the Missouri Supreme Court. No issue is made as to this matter in the present proceeding.

A tape recording was made of this statement, and the tape was played before the jury at the trial.

Dr. George Gantner, Jr., the chief medical examiner of the City of St. Louis, performed an autopsy on Erson's body. He testified at the trial that Erson was killed by a single gunshot wound which entered the right side of the body and exited the left side. (T. 343) He said that if Erson had been sitting at the driver's seat of the automobile, the gunshot would have come from the passenger side; it could not have come from the driver's side. (T. 344)

A bullet was found at the scene of the shooting. (T. 361-62) Sometime later, the police recovered the gun which Erson had with him that evening. (T. 378) A ballistics expert testified for the prosecution that the bullet came from Erson's gun. (T. 394)

Petitioner's Evidence

Petitioner testified that he remained in the truck while Lomax and another person confronted the man in the automobile, and that he was in the truck when the shooting occurred (T. 472); that he did not see a gun that evening (T. 481, 504); that he did not know that the others intended to rob the man (T. 481); and that he did not know the man was a police officer (T. 520).

As mentioned, the jury found petitioner guilty of capital murder. At the second stage of the trial, the jury made an affirmative finding as to the aggravating circumstance that the murder was committed against a peace officer while engaged in the performance of his official duty. The jury assessed the punishment at death, and petitioner was sentenced accordingly.

## ARGUMENT

### I

### The felony murder issue

The Missouri Supreme Court ruled that the trial court did not err in failing to instruct the jury on felony murder. (Op. 2-4) We asserted in that court, and we assert here that petitioner was entitled to such an instruction. The issue is of constitutional dimension.

The Missouri Supreme Court has said that the same evidence may support a finding of conventional (capital) murder and also felony murder. State v. Turner, 623 S.W.2d 4, 8 (1981). Petitioner was convicted of capital murder on the basis of his confession. (T. 443-57) It is apparent that the confession also supported a finding that petitioner shot Erson in the perpetration or the attempt to perpetrate a robbery. He stated (T. 446):

> ". . . We was ridin' and we seen this car parked at the curb on Westminster. We pulled in front of the car, and Les got out of the truck and went and said something to him, or whatever. I was in the truck. I don't know what he said. And then he came back and said he wanted a date, and he had some money. So, me and Les started back to the car. I went around on the passenger side and asked for his money.
>
> "DETECTIVE MC COY: How did you ask for it?
>
> "MR. BAKER: Told him to give me his money. And he reached down as if he was reaching for a gun or something, and I shot him. And then, I went down to the driver's side, and I got the money out his pocket . . ."

The jury was instructed with regard to capital murder (Instruction No. 7, L.F. 56), murder in the second degree (Instruction No. 8, L.F. 57), and manslaughter (Instruction No.

9, L.F. 58). Instruction No. 7 (MAI-CR2d 15.02) was as follows:

INSTRUCTION No. 7

"If you find and believe from the evidence beyond a reasonable doubt:

First, that on June 19, 1980, in the City of St. Louis, State of Missouri, the defendant or another person caused the death of Gregory Erson by shooting him, and

Second, that the defendant or another person intended to take the life of Gregory Erson, and

Third, that the defendant or another person knew that he was practically certain to cause the death of Gregory Erson, and

Fourth, that the defendant or another person considered taking the life of Gregory Erson and reflected upon this matter coolly and fully before doing so,

then you are instructed that the offense of capital murder was committed, and if you further find and believe from the evidence beyond a reasonable doubt:

Fifth, that before or during the commission of such offense and with the purpose of promoting its commission, the defendant aided or attempted to aid such other person in committing the offense,

then you will find the defendant guilty of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense."

Instruction No. 8 (MAI-CR2d 15.14) pertaining to second degree murder, is in the same general form as Instruction No. 7, except that the first three submissions of fact are as follows

(L.F. 56):

"First, that on June 19, 1980 in the City of St. Louis, State of Missouri, the defendant or another person caused the death of Gregory Erson by shooting him and

Second, that the defendant or another person intended to take the life of Gregory Erson, and

Third, that the defendant or another person did not do so in fear suddenly provoked by the unexpected acts or conduct of Gregory Erson,

then you are instructed that the offense of murder in the second degree was committed . . ."

The Missouri statute pertaining to felony murder, denominated first degree murder, is RSMo 565.003, which provides:

> "Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping."

This offense carries punishment of life imprisonment. RSMo sec. 565.008(2).

The Missouri approved Instruction relating to this offense is MAI-CR2d 15.12. If it had been given to the jury by the trial judge, it would have been as follows (as adapted to the circumstances of this case):

INSTRUCTION NO. ___

"If you find and believe from the evidence beyond a reasonable doubt:

First, that on June 19, 1980 in the City of St. Louis, State of Missouri, that defendant caused the death of Gregory Erson by shooting him, and

Second, that he did so in robbing or attempting to rob Gregory Erson,

then you will find the defendant guilty of murder in the first degree . . ."

The trial judge considered giving such an instruction but finally decided against it. (T. 563-66)

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In the last several years the decisions of the Missouri Supreme Court regarding the relationship between capital murder (that is, conventional murder) and felony murder have been characterized by very considerable inconsistency and ambivalence. Primarily the problem has been whether one of these offenses is a lesser included offense of the other. Prior to September 1975 both conventional murder and felony murder were covered by the same statute, RSMo sec. 559.010, and both were denominated first degree murder. A charge of first degree murder embraced every grade or degree of criminal homicide. State v. Clark, 546 S.W. 2d 455, 470 (25) (Mo.App. 1976). Felony murder was an included offense of first degree conventional murder, and conventional murder second degree was an included offense of felony murder. State v. Jewell, 473 S.W.2d 734, 739 (1971).

Then in 1975 the Missouri legislature enacted new homicide statutes. Capital murder (previously first degree conventional murder) was one section, RSMo 559.005 (later sec. 565.001). Felony murder was another section, RSMo 559.007 (later sec. 565.003). In due course the Missouri Supreme Court was confronted with the question of whether a defendant charged with felony murder could be convicted of second degree conventional murder. (RSMo 565.004) The court ruled that he could not because the elements were different in each instance. State v. Handley, 585 S.W.2d 458 (1979). Under the Handley rule, one of these offenses was not a lesser included offense of the other;



439 U.S. 14.

## CONCLUSION

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

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and if a defendant was charged with capital murder, the trial court could not instruct on felony murder, and vice versa as regards second degree (conventional) murder.

Less than two years later, the Missouri Supreme Court rejected the Handley rule and returned to the previous rule. In State v. Wilkerson, 616 S.W.2d 829 (1981) the court, noting that the Handley rule "has caused considerable consternation in the Bench and Bar of this State" (616 S.W.2d at 830) ruled that a defendant charged with felony murder could be convicted of second degree conventional murder. The basis for this holding was that second degree conventional murder was a lesser degree of offense of felony murder. The court ruled that the Handley case rule should no longer apply. Under the Wilkerson rule, where a defendant was charged with capital murder, it was reversible error not to give the jury an instruction on felony murder where the evidence supported felony murder. State v. Gardner, 618 S.W.2d 40 (Mo. 1981). Under the Wilkerson rule, where a defendant was charged with capital murder, the trial judge was required to give an instruction on any degree of homicide which was "justified by the evidence." Id., 618 S.W.2d at 41.

That was the state of the law when the present case came before the Missouri Supreme Court. Appellant was charged with capital murder and the trial court failed to instruct on felony murder. Petitioner relied on State v. Gardner, supra. However the court changed its ruling again and held that the trial court properly did not instruct on felony murder. The basis for this ruling was that felony murder is not a lesser included offense of capital murder. The court ruled that State v. Gardner was no longer the law, and affirmed petitioner's conviction.

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Our points of complaint are two. First, petitioner has been a judicial victim of a violation by the Missouri Supreme Court of standards of decisional consistency that are expected of state courts. Compare Boule v. City of Columbia, 378 U.S. 347, 354. Under Missouri law as it existed prior to 1975, felony murder was a lesser included offense of conventional murder. Under the Handley rule in 1979, it was not a lesser included offense. Under the Wilkerson rule in 1981, it was a lesser included offense. Under the present case in 1982, it was not a lesser included offense.

This inconsistency is not a trivial or inconsequential matter because capital murder carries the death penalty if the jury so assesses the punishment; felony murder is punishable by life imprisonment. The difference is a matter of constitutional cognizance. "As we have stated, there is a significant constitutional difference between the death penalty and lesser punishments." Beck v. Alabama, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389. As one writer has said, ". . . state courts may not juggle their laws in an unpredictable and inconsistent fashion to the prejudice of federal constitutional rights." (Citations omitted) Donohue, Death Penalty, 30 Catholic Law Rev. 1, 57. Life and death cannot depend on shifting and variable notions of lesser offenses. There is a fundamental injustice when one defendant committing a particular offense at one point in time is not subject to the death penalty, whereas another defendant who has committed the same offense at another point in time is subject to that penalty. "Yet most dramatically when life is at stake, equality is, as it is generally felt to be, a most important element of justice." (ALI, Model Penal Code and Commentaries, Part II, p. 114, par. 210.6)

In the second place, we contend that the Missouri Supreme Court erred in that its ruling operates to deny petitioner constitutional due process of law by depriving him of the protection afforded by an instruction on a lesser offense--that is, an instruction which was supported by the evidence and which carries a punishment other than the death penalty. In Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, this Court held that the failure of the state of Alabama to permit the jury to find that the accused--charged with capital murder--committed felony murder as an alternative, was constitutionally impermissible. The Court said (447 U.S. at 637-38, 100 S.Ct. at 2389-90):

> ". . . For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> "Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishment: . . .
>
> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion', we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case."

The Missouri Supreme Court's opinion herein attempts to distinguish the Beck case on grounds that felony murder is not now a lesser included offense under Missouri law (although, as mentioned above, that court was of a different view in State v. Jewell, supra, 473 S.W.2d 734, and in State v. Wilkerson, supra, 616 S.W.2d 829). Also the Missouri Supreme Court said that in any event there was a "third option" granted by way of the trial

court's instruction to the jury on second degree murder.

We think that the Missouri Supreme Court's rationale in attempting to distinguish the Beck case is not acceptable. When the prosecution's evidence in a capital case supports a finding of guilt on a charge which carries a lesser punishment than death, the failure to grant the petitioner the protection afforded by an instruction on that charge is constitutionally impermissible whether or not such an alternative offense is technically described--at one or another point in time--as a "lesser included offense".

Moreover, the trial court's instruction on second degree (conventional) murder plainly did not permit the jury the option of finding that the shooting took place in the course of the perpetration of or the attempt to perpetrate robbery. That instruction was not--contrary to the Missouri Supreme Court's view of the matter--a valid alternative.

We submit that the ruling in the Beck case applies, and requires a reversal of the Missouri Supreme Court on this issue.

II

The jury's verdict assessing the death penalty is not inconsistent with a finding that petitioner did not himself shoot the victim.

The only direct evidence of petitioner's participation in the robbery and the murder consisted of petitioner's confession wherein he stated that he and Lomax together approached the parked automobile--petitioner from the passenger side and Lomax from the driver's side; that petitioner demanded the man's money; and that when the man reached for a gun in a holster of his left leg (T. 417), petitioner shot him. A pathologist testified for the prosecution that the victim's death occurred from

a gunshot which came from the passenger side of the automobile.

But there was other highly relevant evidence produced by the prosecution as to how the shooting occurred. A ballistics expert testified that the bullet which killed Erson was fired from Erson's gun. Erson's gun was in his holster on his left leg at the driver's side of the automobile. (T. 280-81, 287) There is an obvious contradiction here. If petitioner's confession is believed (and clearly the jury believed it and the Missouri Supreme Court accepted it), then petitioner--at the passenger side of the automobile--shot Lomax' gun and not Erson's gun. On the other hand, if petitioner's confession is accepted insofar as it places Lomax on the driver's side, and if the ballistics expert's testimony is accepted to the extent that the gunshot came from Erson's gun, then there should be a finding that Lomax did the shooting because only Lomax, and not petitioner, was in a position to fire Erson's gun.

That being the situation, the trial judge in his instructions gave the jury two choices as regards the issue of guilt: (1) whether petitioner shot Erson, or (2) whether Lomax shot Erson and petitioner aided and abetted him. This is exactly what Instruction No. 7 hypothesized. (See p. 9, supra) We cannot determine from the verdict which of these theories the jury accepted. (*) And insofar as liability on the charge of capital murder is concerned, it makes no difference because the statute applies to aiders and abettors as well as to those who do the actual killing. State v. Turner, 623 S.W.2d 4, 8 (Mo. 1981).

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(*) The verdict reads: "We, the jury, find the defendant guilty of capital murder, as submitted in Instruction No. 7." (L.F. 73)

At the second stage of the trial, the court submitted the following aggravating circumstance (L.F. 67): "Whether the murder of Gregory Erson was committed against a peace officer while engaged in the performance of his official duty. It was the official duty of Gregory Erson to investigate possible incidents of prostitution in an area of the City of St. Louis, in his capacity as an officer of the St. Louis Metropolitan Police Department." The jury made an affirmative finding as to this. Its written response was (L.F. 74): "The murder of Gregory Erson was committed against a peace officer while engaged in the performance of his official duty. It was the official duty of Gregory Erson to investigate possible incidents of prostitution in an area of the City of St. Louis, in his capacity as an officer of the St. Louis Metropolitan Police Department."

But this finding also does not state whether petitioner or Lomax did the shooting. Obviously the jury could have found that Lomax rather than petitioner committed that act. But if Lomax did it, and if petitioner did not intend to do it, then the death penalty does not apply to petitioner. In Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368, 3376 (1982) (*) this Court said:

> "Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not."

Thus the aggravating circumstance here in question simply

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(*) The Enmund case was decided on July 2, 1982, subsequent to the time the Missouri Supreme Court took the present cause under submission on May 17, 1982 and before its decision on August 23, 1982.

does not determine the matter. At the very least, in order to properly submit the issue, the trial court's instruction should have required a finding beyond a reasonable doubt whether petitioner himself shot Erson, or that, if he did not, whether petitioner attempted to kill or intended that a killing take place or that lethal force be employed. The submission to the jury was error because it lacks--in this respect--objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death. Woodson v. North Carolina, 428 U.S. 280, 303.

In our argument at Points III and IV, infra, we refer to the petitioner as the person who did the shooting; but this is an assumption for the purpose of argument and should not be considered as conceding that that was the way the homicide occurred.

III

The knowledge issue

In the Missouri Supreme Court, the dissent parted from the majority on this issue. The dissent interpreted the majority as not requiring knowledge on the part of the petitioner that the victim was a police officer. We agree with this interpretation. The majority notes the petitioner's contention in his appeal to that court that such knowledge should be required because otherwise the mens rea is absent. The majority then--although it says in passing that the evidence was sufficient to support such knowledge--nevertheless declares "we decline to address the unscrutable (sic) question of mens rea." (Op. 7) The dissent states plainly that a decision regarding such knowledge is essential to a proper finding as to the aggravating circumstance. It said: "The notion of mens rea is deeply rooted in American

jurisprudence. American criminal law has long joined the guilty act with the guilty mind and has consistently required wrongdoing to be conscious to the criminal. Morissette v. United States, at 251-57. Today, this court seeks to sever that tie, and sets a dangerous precedent by interpreting sec. 565.012.2(8) as not requiring knowledge as an element of an aggravating circumstance." (Dissent p. 5)

We think that the dissent is clearly correct in requiring knowledge. We add the following thereto.

(1)

The fact that the Missouri legislature made the murder of a police officer a specific category of aggravating circumstance and subject to the death penalty necessarily requires that there be an intent on the part of the accused to murder a person known to be a police officer in order to commit this special type of offense. This Court in Morissette v. United States, 342 U.S. 246 (1952) discussed the matter of intent at length. There the Court drew a distinction between (1) petty crimes, and public welfare offenses constituting violations of police or social regulations, which as a matter of policy and effective enforcement dispense with a requirement of intent, and (2) serious, common law offenses such as stealing and larceny, which require proof of intent. The court said (l.c. 260-61):

> "Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland is '. . . as bad a word as you can give to man or thing.' State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses. If any state has deviated, the exception has neither been called to our attention nor disclosed by our research."

Certainly if stealing and larceny "stir a sense of insecurity in the whole community" and "arouse a public demand for retribution" and carry a "high penalty", surely a special type of crime calling for the death penalty should be considered in that category of serious offense which requires an intent to commit that particular crime.

(2)

Secondly we contend that the rulings of this Court regarding the requisites for the application of the death penalty necessitate a determination that the petitioner knew that the victim was a police officer.

In Hopper v. Evans, ____ U.S. ____, 102 S.Ct. 2049, 2052, this Court said: "Our holding in Beck, like our other Eighth Amendment decisions in the past decade, was concerned with assuring that sentencing discretion in capital cases was channelled so that arbitrary and capricious results would be avoided." An essential feature of this approach is that the sentencing procedure guide and focus "the jury's objective consideration of the particularized circumstance of the individual offense." Jurek v. Texas, 428 U.S. 262, 273-74. The "particularized circumstances" of the specific offense here necessarily must require knowledge on the part of the accused that the victim was a police officer. Otherwise the offense cannot be distinguished from the numerous instances in which a homicide is committed in the perpetration of or attempt to perpetrate robbery and in which the punishment is life imprisonment (compare, RSMo sec. 565.003; 565.008(2)); and "there is no meaningful basis for distinguishing the few cases in which it (the death penalty) is imposed from the many cases in which it is not." (Furman v. Georgia, 408 U.S. 238, 313, White J., concurring)

To the same effect is Woodson v. North Carolina, 428 U.S. 280, 303-304.

(3)

The imposition of the death penalty in absence of the element of knowledge also constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Although that Amendment is not in terms referred to by the Missouri Supreme Court's dissent, that is the clear import of portions of that opinion.

> ". . . The defendant is to be executed on the sole ground that the capital murder was committed against a peace officer while engaged in the performance of his official duty, sec. 565.012.2(8), without the jury at any stage in the trial being required to find that defendant knew or should have known that the victim was a member of the class described.
>
> "This is to be the outcome regardless of the fact that the victim was purposely disguised so that people would not know he was a police officer on duty. The impression deliberately sought to be made upon others was that the victim was a private citizen . . . (Dissent, p. 1)
>
> ". . . This defendant will likely be executed for the entirely fortuitous circumstance that the victim, who was dressed in civilian clothes and who to all appearances was a private citizen, turned out to be unknown to defendant, a police officer . . ." (Id, p. 5)

We add the following to the dissent's discussion.

In Roberts v. Louisiana, 431 U.S. 633 (1977), this Court set aside the death sentence as a violation of the Eighth and Fourteenth Amendments. There the state statute required the imposition of the death penalty in cases of first degree murder, and one of the subsections of first degree murder pertained to the killing of a police officer. Defendant was convicted of that offense. The Court ruled that the mandatory method was unacceptable. "Because the Louisiana statute does not allow for consideration of particularized mitigating circumstances it is unconstitutional." 431 U.S. at 637

In a similar way, the imposition of the death penalty in the case at bar is in violation of the Eighth and Fourteenth Amendments in that it was assessed arbitrarily and without regard to the mitigating circumstance that the petitioner did not know that the victim was a police officer.

Therefore we submit that the validity of the aggravating circumstance in this case depends on a determination that the petitioner knew that Erson was a police officer. On the assumption that we are correct in this position, we now make two further contentions: first, that the evidence was insufficient as a matter of law to support a finding that petitioner knew that the victim was a police officer; and second, that if the evidence was sufficient in that regard, then the jury's verdict assessing punishment is invalid because it is necessary that there be a jury finding as to such knowledge.

IV

Determination of the knowledge issue

(1)

Insufficiency of the evidence

We repeat briefly what was said in connection with Point I supra. The petitioner's confession was the only direct evidence of his guilt. According to that confession, he shot Erson while confronting him at the passenger's side of the automobile. The pathologist testifying for the prosecution stated that the bullet that killed Erson came from the passenger side of the automobile. On the other hand, the ballistics expert testifying for the prosecution stated that the bullet came from Erson's gun. But Erson's gun, by all accounts, was in his holster on his left leg, next to the driver's door. Lomax was confronting Erson from the driver's door.

Considering these facts, how can it possibly be found that petitioner shot Erson from the passenger side with Erson's gun which was on the driver's side of the automobile? Yet that is the essential basis for the majority opinion's statement that the evidence was sufficient to show that petitioner knew that Erson was a police officer. That opinion says (p. 7): "There was a police radio on the front seat of the car. Ballistics evidence showed that Erson was shot with the revolver issued to him by the police department. The evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that appellant knew Erson was a police officer."

The plain implication of the court's statement is that the evidence established that the petitioner shot Erson with his own gun. But a rational trier of fact would be so hopelessly confused by the contradictory evidence in that regard that he could reach an affirmative finding only by applying sheer speculation.

We submit that the evidence pertaining to petitioner's knowledge does not meet the standards applicable to proof beyond a reasonable doubt, and therefore that this aggravating circumstance should not have been submitted to the jury. (Jackson v. Virginia, 443 U.S. 316, 317-19)

(2)

Necessity of requiring a jury finding as to knowledge

We submit that our contention as to (1) above is sound and should be sustained. Our contention here, at (2), is in the alternative: If this Court overrules our contention as to (1), then the jury's finding as to the aggravating circumstance should be set aside because there was no finding by the jury on the issue of knowledge.

The majority opinion approving the jury's finding as regards the aggravating circumstance does not consider whether there should be a jury finding as to petitioner's knowledge. The dissent asserts that such a finding is essential. It states: "While the principal opinion pronounces that the evidence 'established beyond a reasonable doubt' that defendant knew the victim was a police officer, this is a disputed issue of fact, which was for the jury, not this court, to resolve." (Dissent, p. 2)

We submit that the dissent is right. We add the following thereto.

In Gregg v. Georgia, 428 U.S. 153, 189, this Court said (joint opinion of Stewart, Powell, and Stevens, JJ.):

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

And in Godfrey v. Georgia, ____ U.S. ____, 100 S.Ct. 1759, 1764-65, the Court said:

> ". . . (A State) must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process of imposing a sentence of death.'"

That means, in the case at bar--if knowledge is an essential element--that the jury must make a finding with regard thereto; and that the jury must be instructed that it can make an affirmative finding only if there is proof beyond a reasonable doubt.

Note that the Court in the cases above cited refers to the sentencer's discretion. It is not a matter for the Missouri Supreme Court to decide as if it were the jury. Here the Missouri Supreme Court simply usurped the jury's function and duty. See also Sandstrom v. Montana, 442 U.S. 510; Fresnell v. Georgia,